

ENTERED

May 03, 2024

Nathan Ochsner, Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

JOHNNY LEE DAVIS,

Petitioner,

VS.

BOBBY LUMPKIN,

Respondent.

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CIVIL ACTION NO. 2:23-CV-00316

ORDER ADOPTING MEMORANDUM AND RECOMMENDATION

Pending before the Court is Plaintiff's petition for writ of habeas corpus (D.E. 1) for initial screening under 28 U.S.C. § 1915A. On January 31, 2024, United States Magistrate Judge Mitchel Neurock issued a Memorandum and Recommendation (M&R, D.E. 13), recommending that Petitioner's § 2254 action be dismissed without prejudice to his seeking authorization from the Fifth Circuit to file this action in this Court.

Petitioner timely filed his objections and motion to strike (D.E. 14) on February 14, 2024. On March 11, 2024, Petitioner filed in this Court his "Motion for an Order Authorizing the United States District Court for the Southern District of Texas to Consider a Successive 28 U.S.C. § 2254 Application" (D.E. 15), captioned as if filed in the Court of Appeals for the Fifth Federal Circuit. The Court construes this motion as additional objections.

Petitioner concedes that this Court does not have jurisdiction, but then argues that this Court should transfer his petition to the Fifth Circuit because his "newly discovered

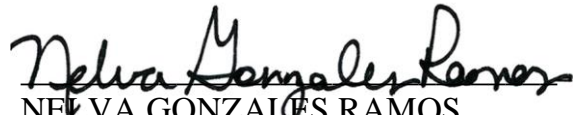
evidence” argument has merit. This assertion is conclusory, failing to point out with particularity any error in the M&R. Consequently, it does not constitute a proper objection and will not be considered. Fed. R. Civ. P. 72(b)(2); *Malacara v. Garber*, 353 F.3d 393, 405 (5th Cir. 2003); *Edmond v. Collins*, 8 F.3d 290, 293 n.7 (5th Cir. 1993) (finding that right to de novo review is not invoked when a petitioner merely re-urges arguments contained in the original petition). The objection is **OVERRULED**.

Petitioner further asks that the M&R be stricken as prejudicial to his anticipated effort to obtain permission from the Fifth Circuit to file this action, a condition precedent to this Court obtaining jurisdiction to adjudicate his petition. The M&R—or a similar analysis initiated by this Court—is necessary to the disposition of the petition . . . as Petitioner filed it. There is no basis in law to strike it as prejudicial and it is in no way prejudicial to the Fifth Circuit’s independent review of the matter, which it performs de novo. The only way that Petitioner could have avoided such an M&R is to have obtained Fifth Circuit permission prior to filing his successive petition. The motion to strike (D.E. 14) is **DENIED**.

Petitioner’s motion (D.E. 15) purporting to seek Fifth Circuit permission to proceed with his petition is filed in the wrong court and does not provide any additional argument to demonstrate any error in the M&R. Therefore, the motion for an order permitting his successive petition for writ of habeas corpus (D.E. 15) is **DENIED** without prejudice to refiling in the correct court.

Having reviewed the findings of fact, conclusions of law, and recommendations set forth in the Magistrate Judge's Memorandum and Recommendation, as well as Petitioner's objections, and all other relevant documents in the record, and having made a de novo disposition of the portions of the Magistrate Judge's Memorandum and Recommendation to which objections were specifically directed, the Court **OVERRULES** Petitioner's objections and **ADOPTS** as its own the findings and conclusions of the Magistrate Judge. Accordingly, Petitioner's § 2254 action is **DISMISSED** without prejudice to his seeking authorization from the Fifth Circuit to file this action in this Court. The Court **DENIES** a certificate of appealability, **DENIES** as moot Petitioner's motion for discovery (D.E. 12), **DENIES** Petitioner's motion to strike (D.E. 14) and **DENIES** without prejudice Petitioner's motion for Fifth Circuit order to proceed (D.E. 15).

ORDERED on May 3, 2024.


NELVA GONZALES RAMOS
UNITED STATES DISTRICT JUDGE